Walkup, Shelby, Bastian, Melodia, Kelly, Echeverria & Link

FOCUS ON TORTS

VOLUME IV, NUMBER 2 SUMMER 1990

Rick Goethals Named Chair of Plaintiff's Liaison Committee

600 California St. Crane Claims Consolidated

Vehicles on California Street felt the weight of the collapsed crane.

On November 28, 1989, the tower crane atop the Federal Home Loan Bank Building at 600 California Street (immediately adjacent to our offices) collapsed carrying four iron workers to their death. Miraculously, although the crane fell into the busy Kearny/California Street intersection at 8:15 a.m., only one person on the ground was killed. Unfortunately, a number of people were injured, and substantial property damage was done to buildings at 580 and 601 California Street.

To date, more than a dozen actions have been filed. Our office is privileged to represent multiple claimants. Recently, **Richard B. Goethals, Jr.**, of our firm was appointed by Judge Carlos T. Bea as chairman of the plaintiffs' liaison committee. This committee will coordinate all plaintiffs' discovery against the various defendants.

Cal/OSHA has concluded that although all of the events which led to the collapse will never be known because those with the most knowledge of what happened were killed, the accident was likely a result of inadequate supervision and training of the erection crew. In addition to subjecting the crews' employer to direct liability, this conclusion could subject the general contractor for the project and the structural steel contractor to liability for failing to hire qualified subcontractors and for failure to take precautions against the peculiar risk of harm presented by this tower crane (Restatement §§413, 416).

Additionally, it appears there may have been defects in the design and maintenance of the crane, which could subject the owner of the crane and the crane manufacturer to liability.

All claims filed to date have been consolidated before San Francisco Superior Court Judge Carlos T. Bea. In addition to setting guidelines for discovery, service of process, and law and motion matters, Judge Bea has directed that settlement conferences be held during the summer.

INSIDE

A Publication from the Law Offices of Walkup, Shelby, Bastian, Melodia, Kelly, Echeverria & Link
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First PSA Crash Verdict Obtained

On December 7, 1987, a PSA airliner on its way to San Diego crashed near San Luis Obispo when its flight crew was shot by a former employee of USAir, David Burke. All on board the plane were killed.

Ronald H. Wecht and **Kevin L. Domecus** of our firm have had primary responsibility for managing this litigation. As a member of the plaintiffs' steering committee, Ron was one of three attorneys who represented the families of all victims during the liability trial in Los Angeles Superior Court in May and June of 1989.


44 Die in Fiery Crash of PSA Jet

S.F.-Bound Jet Crashes

44 Die — PSA Crew Reported Gunshots

Gun Found at PSA Crash Scene

San Francisco Chronicle

After a five week trial, and just before the case was to go to the jury, the defendants decided to admit liability. Thereafter, Ron tried the first of the damage cases, *Yi v. PSA,* in April, obtaining a verdict in excess of $800,000.

Discovery in the case indicated that Burke, fired some three weeks before the crash for stealing money from the flight attendants' liquor receipts, was bent on revenge against a former supervisor.

On the day of the crash Burke had traveled to the airport for a meeting with his former boss. At the airport he entered the passenger boarding area without traveling through normal passenger screening by using a photo I.D. card, consistent with then-prevailing LAX employee security procedures for active airline employees.

Subsequent to the morning meeting with his ex-supervisor, Burke booked passage on the fatal flight, the same flight on which his ex-supervisor was traveling. In the wreckage of the crash a note from Burke to his supervisor was discovered. In the note Burke said he had asked for mercy and had been given none, and that he intended to show none to his former boss. Also found among the wreckage was a portion of a USAir employee photo I.D. badge bearing Burke's name and a pistol traced to Burke from which all bullets had been fired. The photo I.D. badge was to have been turned in at the time of his termination.

At trial, plaintiffs claimed that PSA (now USAir) was negligent in its handling of security procedures; that there was no requirement that employee rosters be kept up-to-date; that I.D. cards were not strictly accounted for; that combination locks on various doors to and from highly sensitive areas were not changed after the firing; and that security personnel were not notified when employees were terminated for cause.

A second defendant, Ogden-Allied, the private contractor hired to perform passenger screening at the terminal was alleged to be at fault for having permitted Burke to bypass the metal detectors on the day of the crash. This claim centered on Ogden's failure to verify the authenticity of Burke's I.D. badge, and/or to establish that he was in fact a current airline employee.

Finally, the City of Los Angeles was sued as the operator of the airport, with co-equal responsibility for I.D. card control. Discovery indicated that the card system was completely out of control with thousands of unaccounted for I.D. cards.

At trial, defendants conceded that Burke had gotten a pistol aboard the plane, but denied that his ability to get the pistol on board was the result of any deficiency in security. The defendants also contended that it was impossible to maintain accurate I.D. card control given the high turnover in airport employees and the sheer number of employees at LAX. Further, defendants alleged that there was no reason to suspect that an individual terminated for stealing petty cash was likely to commit murder.

The liability trial lasted five weeks. As noted above, one day before final argument defendant USAir conceded liability and responsibility for any and all damages to the remaining plaintiffs.

The trial of the *Yi* case was the first of the damage cases following the liability trial. Mr. Yi was survived by a wife and two sons. Unfortunately, there were no financial records for the three years immediately preceding his death, and the decedent had not filed tax returns for 1985 or 1986. For this reason, there was significant dispute about the amount of any loss of financial support. In addition, Mr. Yi had unsuccessfully attempted to start two businesses and was in default on a bank loan. On the other hand, all evidence indicated a good and loving family relationship. The jury verdict in the matter totaled $825,000, with the majority of the award apportioned to non-economic damages for loss of love, affection, care, comfort and society. The last pre-trial offer had been $650,000.

Walkup Welcomes New Associate

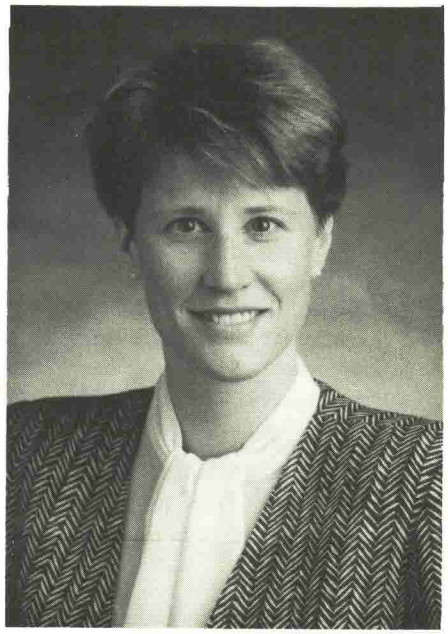
We are pleased to announce that **Cynthia Newton** has joined our firm as an associate. Born and raised in eastern Washington State, Cynthia was a Phi Beta Kappa scholar at Washington State University where she obtained her Bachelor's Degree in 1982. Following graduation she returned to Washington State to teach writing courses while attending graduate school.

In 1984 Cynthia moved to California to attend Hastings College of the Law. She obtained her J.D. Degree in 1987 and was admitted to the bar that same year. While at Hastings she wrote for the Hastings International and Comparative Law Review. In addition, she served on the Disqualified Students Committee, the Admissions Committee, and was awarded the Jurisprudence Award in Advocacy. She also served as an extern for Federal District Judge Robert H. Schnacke.

After her admission to the Bar, Cynthia joined the firm of Lossing and Elston, specializing in insurance defense with emphasis in the areas of medical negligence and auto liability. Most recently, she has practiced with the legal department of Southern Pacific Transportation Company, defending cases brought under the Federal Employers Liability Act.

Cynthia is a member of the Association of Trial Lawyers of America, the Queen's Bench, the California Trial Lawyers Association, and the San Francisco Trial Lawyers Association.

We are both pleased and proud to have Cynthia associated with our firm.



Cynthia Newton

Help From Uncle Sam in Product Cases

Did you know that all bicycles sold in the United States must be manufactured such that the mechanical skills required for assembly "shall not exceed those possessed by an adult of normal intelligence and ability"? The Consumer Product Safety Act requires it! (16 CFR 1512.4)

This is one of *numerous* rules set out by the Commission to regulate the safety of products ranging from power lawn mowers (16 CFR 1511) to mattress pads (16 CFR 1632).

Formed in 1973 under the provisions of the Consumer Product Safety Act (CPSA) 15 USC 205 *et seq.*, the Consumer Product Safety Commission (CPSC), promulgates rules implementing the Federal Hazardous Substances Act (15 USC 1261-74 at 16 CFR 1500 *et seq.*), and the CPSA (16 CFR 1101-1406).

The Commission is also empowered to issue rules enforcing the Federal Flammable Fabrics Act (16 CFR 1600), and the Poison Prevention Packaging Act of 1970 (16 CFR 1700).

While violation of these rules does not create a private right of action [*Riegel Textiles Corporation v. Celanesees Corporation*, 649 F.2d 894. 899-903 (1981)], information and documents obtained from the Commission often prove quite helpful in prosecuting product liability claims under negligence or strict liability theories.

For example, the FHSA sets out labelling requirements for all toys which may present mechanical, electrical or thermal hazards [15 USC 1262(e)]. Failure to provide these warnings may be negligence per se, while compliance with the warnings rules is *not* a defense. See *Burch v. Amsterdam*, 366 A.2d 1079 (1976) and *Jonescue v. Jewel,* 306 N.E. 2d 312.

The CPSA (at 16 CFR 1115.12) requires *manufacturers, distributors* and *retailers* of consumer products to *report* defects (defined in 1115.4) to the Commission and to at least study and determine whether to report information about engineering, quality control, safety-related design changes, consumer complaints, product liability suits and recalls (16 CFR 1115.12). This information is available through the Freedom of Information Act.

The information is *not* available by subpoena, and CPSC employees will *not* testify (see 16 CFR 1016.4). Hence, authentication and admissability will have to be established through California Evidence Code §§1270, 1280, 1340 etc.

Once in hand, this information may be used to show prior accidents, notice, feasibility of alternative safe designs, etc. Evidence of prior consumer complaints may also be admitted to prove knowledge of danger, cause or malice. Recall information is admissible to show proof of a defect. *Favner v. Pacear*, 562 F.2d 518 (8th Cir. 1977); *Herndon v. Seven Bar,* 716 F.2d 1322 (10th Cir. 1983). As subsequent remedial conduct, these documents can be offered to show control or ownership over the product, impeachment by conduct or to rebut a denial of feasibility.

The Commission also issues opinions, or "Fact Sheets," which can be used to show a manufacturer's or distributor's knowledge or notice. Opinions have been issued on products such as sleds, toy boxes and skateboards, and high chairs.

It has been our experience that by framing an initial request to CPSC *prior* to the institution of suit and discovery, the defendant's product experience can be determined.

Dalkon Shield Claimants Trust Commences Claims Evaluation

In May of this year the Dalkon Shield Claimants' Trust began payment of claims filed under the Option 2 and 3 standards of the Dalkon Shield Claimants Trust.

Option 1, available since December, 1988, is designed for claimants with minor injuries or no medical records to prove injuries. The highest option 1 payment was $725.00. Over 90,000 claimants elected to settle their claims under Option 1.

Option 2 pays claims according to a fixed payment schedule. A claimant must present evidence that she used a Dalkon Shield and suffered some injury as a result of that use. Claimants do not have to prove that the Dalkon Shield caused their injuries under Option 2. The highest payment pursuant to the Option 2 payment schedule is $5,300. By mid-May, over 1,000 claimants had been paid pursuant to Option 2.

Under Option 3, claimants must present proof of their use of the Dalkon Shield and medical records proving that the Dalkon Shield caused their injuries. Option 3 requires a full review of medical records. No payment schedule has been published for Option 3 because the settlement offers allegedly will be based on variables that differ from case to case.

The payments made thus far under Option 3 have borne a reasonable relation to settlement values prior to A.H. Robins' bankruptcy.

Most of the claims in this office are being filed under Option 3. The Option 3 claim form is a 40-page booklet requiring careful scrutiny of all medical records and problems involving statute of limitations. The Trust requires that the claim be verified both by the claimant and the attorney filing the claim. The trustees have reported that there have been more Option 3 filings than originally estimated. As a result of this, they are training additional claim reviewers for Option 3 cases. Hopefully the pace of resolution of Option 3 claims will increase over the course of the summer.

No guidelines for the arbitration and trial of claims have been published. Option 3 claimants may reject the offer of the Trust and proceed to litigation pursuant to the Trust guidelines. However, it is unlikely that any of these matters will be litigated until the beginning of 1991.

Sun Valley Mall Airplane Disaster Settled

On December 23, 1985 scores of people were horribly burned when a plane crashed on holiday shoppers at the Sun Valley Mall. The many actions arising out of this tragedy were eventually coordinated and a plaintiffs' Steering Committee formed consisting of, among others, **Ralph W. Bastian, Jr.** of this office. Trial was conducted by the Steering Committee beginning in November of 1988 in Contra Costa County Superior Court before the Honorable Richard Patsey.

During the ten week trial, victims of the crash contended that the accident was caused by a defectively designed fuel cell, a defectively manufactured engine, an improperly maintained aircraft, and an inadequately reinforced roof. Defendants contended that the sole cause of the accident was the pilot who allegedly became disoriented as a result of drug use and the fog and crashed after attempting an illegal approach to the runway at nearby Buchanan Field.

At various stages before and during trial, defendants Teledyne (engine manufactuer), Taubman (roof designer), and Beech (fuel cell designer) settled for an amount which, when combined with $5 million previously interpled by the pilot's estate, amounted to a settlement fund totalling in excess of $11,750,000.

Retired Judge Martin Rothenberg was appointed special master to evaluate all claims and apportion the funds among the plaintiffs. Our clients, four injury and two wrongful death cases, were awarded more than one-fourth of the settlement funds.

Walkupdates

Michael Kelly recently participated in C.E.B.'s two-day Product Liability Institute programs held in Los Angeles and San Francisco. Mike's presentation dealt with government involvement in product claims, particularly federal pre-emption in auto passenger restraint and air bag claims.

Daniel Dell'Osso spoke at a three-day Practicing Law Institute Program on toxic torts held in San Francisco.

Daniel J. Kelly recently appeared on KCSM TV's "Legal Currents" show where he spoke on medical negligence litigation.

Ron Wecht was elected to membership in the American Board of Trial Advocates.

Rich Schoenberger married **Monica Volken** on March 3, 1990, at the Most Holy Redeemer Church. They honeymooned in Portugal.

Paul Melodia was a recent CEB panelist on the program "Preparing and Examining Expert Witnesses in Civil Litigation".

Jeff Holl is one of the founding members of the Barristers Club Speakers Bureau. The Speakers Bureau has been organized to provide attorneys to the San Francisco schools to talk to students on a number of different topics. This program was established both to foster good will between the Bar and the community, as well as a means of informing students about various legal topics. In the first six months of 1990, over 50 lawyers spoke in various San Francisco grammar schools and high schools. Both Jeff and **Cynthia Newton** have made such appearances.

RECENT CASES

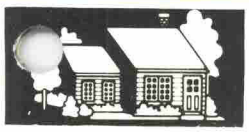
MEDICAL MALPRACTICE

Dumas v. Cooney, et. al.

In *Dumas v. Cooney, et. al.* (Santa Clara County Sup. Ct. No. 633293) **Paul Melodia** obtained a verdict of $321,400 on behalf of a 55-year-old physician who claimed he was the victim of an extensive delay in diagnosis of his lung cancer. Plaintiff presented expert testimony that if his doctors had made the diagnosis two years earlier there was a probability that the cancer would not have spread and therefore plaintiff would have more than a 50% chance of a five year survival without evidence of recurrence. The delay reduced plaintiff's prognosis to approximately 10% to 15% chance of a five year survival. In fact, by the time of trial, plaintiff's cancer had recurred in his chest area and metastasized to his liver.

Stringer v. Janda

In *Stringer v. Janda* (Fresno Sup. Ct. No. 356099-2), **Paul Melodia** obtained a $312,000 verdict in a wrongful death case, resulting from claimed medical malpractice. The decedent was a 43-year-old part time winery worker who underwent arthroscopy and arthrotomy on his left knee. Post operatively he experienced left calf discomfort. The defendant prescribed no specific treatment. One week later the decedent died of pulmonary emboli. Plaintiff's expert witness stated that the pulmonary emboli were secondary to deep vein clotting originating in the left calf.

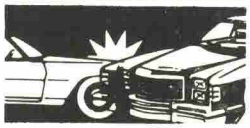


PREMISES LIABILITY

Berger v. Bilafer

In *Berger v. Bilafer* (San Mateo Sup. Ct. No. 335232) **Rick Goethals** negotiated a structured settlement on behalf of a 23-year-old unemployed man injured when he fell from the front porch of the home his parents were leasing from the defendant. The Daly City home was built in 1936. A short retaining wall, only twenty-one inches high, ran along the outside of the front stairs and porch.

Plaintiff fell over this substandard barrier and landed on his head eight feet below. Present building codes require such a wall to be significantly higher. Mr. Berger suffered a fracture-dislocation of his neck with considerable neurological damage. The case was settled on the basis of a combination of cash and future payments. Mr. Berger will receive a lump sum payment of $340,000 plus $1,010 per month for the balance of his life. The annuity is guaranteed for twenty years and has a present cash value equaling the total available insurance of $500,000.



VEHICULAR NEGLIGENCE

O'Connell v. Rodrigues

In *O'Connell v. Rodrigues* (Alameda County Sup. Ct. No. 607 602-7) **George Shelby** received a $250,000 settlement on behalf of a 29-year-old ditch digger. Plaintiff was digging a ditch for a water line in Berkeley when the backhoe he was operating was struck by defendant's dump truck. The driver of the dump truck had failed to notice the line of stopped cars waiting for the flagman's signal to proceed, and in swerving to avoid those cars struck the backhoe. Plaintiff suffered a neck injury which was treated conservatively for several months, eventually leading to cervical laminectomy with a good result. The plaintiff was off work for approximately six months following surgery. His income loss was approximately $40,000. Medical expenses were $45,000.

The defense contended that their truck driver was not at fault for the accident and that the traffic control for the construction project was inadequate to give proper warning of the stopped traffic. The defense also contended that the plaintiff's injury and surgery were due to pre-existing changes in the spine rather than the impact in question. There was a substantial period between the impact and surgery.

The case was settled for policy limits of $250,000.

Hobaugh v. Winfrey

In *Hobaugh v. Winfrey* (Santa Clara Sup. Ct. No. 654007), **Dan Dell'Osso** obtained an arbitration award of $40,657.33, plus costs. Plaintiff in the action was an 18-year-old man who was injured on Highway 17 when the defendant made a left turn in front of him. The plaintiff's injuries consisted of some cuts and abrasions and continuing problems with his low back. MRI studies performed shortly after the accident did show some disc pathology. However, his treating physician did not feel that any type of surgical intervention was warranted. Plaintiff was ultimately able to control his pain with exercise and physical therapy. Defendant's highest offer prior to the arbitration was $35,000.

Bamberger v. Saleh

In *Bamberger v. Saleh* (Contra Costa Sup. Ct. No. C89-01908) **Rich Schoenberger** recently obtained an arbitration award of $41,250 (more than three times the offer made by the defense) in a rear end collision case.

The plaintiff, a 53-year-old union representative, was struck from behind on Highway 24 in Lafayette, CA, and received soft tissue injuries. His medical treatment consisted of pain medications and physical therapy for chronic neck and low back pain. Medical bills totalling $8,705 were the only special damages. There was no wage loss. Liability was admitted; defense counsel asked for an award of $12,500.

Recent Cases Cont.

Continued from page five

Kurland v. Broocker

Goerge Shelby obtained a $90,000 settlement in *Kurland v. Broocker* (San Mateo Sup. Ct. No. 336-289). Plaintiff, 61 years of age, was in the process of making a left turn on El Camino Real in the City of San Mateo when her vehicle was struck by defendant's oncoming company car. The driver/employee had been drinking and was apparently speeding. The defense contended that plaintiff turned left in front of the oncoming vehicle and was partially at fault for the accident. The defense further contended that those responsible for street construction in the area were also at fault in failing to properly delineate the detoured traffic lanes which created a confusing situation for the defendant driver.

Plaintiff suffered a fracture of the left ankle which was surgically set. Medical expenses were $11,000 and there was no income loss.

RECENT SETTLEMENT

Allen v. H & H Oil Tool Co.

As we go to press **Dan Kelly** announced the settlement of *Allen v. H & H Oil Tool Co.* (Sacramento Sup. Ct. No. 507686) for the sum of $1.4 million. The plaintiff, age 72, was rendered an incomplete quadriplegic. His car was travelling at the 55 mph speed limit when defendant's truck made a left turn directly in front of his car. Plaintiff had no time to take evasive action and broadsided defendant's truck. Defendant driver claimed he never saw plaintiff's car.

Plaintiff was seatbelted, but the severe flexion/extension to his neck caused his spinal cord lesion.

Judges Provide Appealing Appellate Humor

Justice Michael A. Musmanno

Humor is seldom expected in Appellate Court decisions. One of the best at sprinkling humor into dry and dusty legal language was the late Justice Michael A. Musmanno of the Supreme Court of Pennsylvania. Some vintage Musmanno follows:

In discussing the right of control, he said the owner "has as much undisputed control (of his business) as Robinson Crusoe had over his island on the Thursday before Friday appeared."

In another case he dissented by stating: "The Majority Opinion is a merry-go-round of words and a Ferris wheel of ideas, traveling horizontally, centrifugally and vertically, but never reaching any destination beyond the original point of departure."

In the famous *Bosley* case, the plaintiff was chased by a bull. Although the bull never struck her, the fright of the situation caused a heart condition. The majority held that she had no legal claim because the bull did not physically touch her. Justice Musmanno concluded his dissent with "In recapitulation, I wish to go on record that the policy of non-liability announced by the Majority in this type of case is insupportable in law, logic, and elementary justice—and I shall continue to dissent from it until the cows come home."

Justice Robert Gardner

Former presenting Justice Robert Gardner of the Fourth Appellate District of the California Court of Appeal also wrote with wit and candor. On the felony murder rule he wrote, "One may rob, burgle, rape, burn, maim or molest and only suffer the consequences of that crime as set forth in the particular code section. If, however, during the perpetration of one of those offenses, the victim dies, then, to quote a recent deathless line from Telly Savalas in *Kojak*, "That's murder one, baby."

On appellate review he wrote: "This whole process of appellate review is not some kind of WPA project for the continued employment of judges, lawyers, secretaries, clerks, book sellers and office equipment salesmen. Hopefully, we do not engage in a process of setting up straw men and then knocking them down in a search for 'arguable' issues."

In a reluctant concurrence he wrote: "I fully recognize that under the doctrine of *stare decisis*, I must follow the rulings of the Supreme Court, and if that court wishes to jump off a figurative Pali, I, lemming-like, must leap right after it. However, I reserve my First Amendment right to kick and scream on my way down to the rocks below."

Justice Gardner also gave the following description of a truly effective trial attorney: "He has the capacity for reducing issues to simple terms. He is as miserly with motions, objections, and issues as an Ernest Hemingway with words or a Louis Armstrong with musical notes."

For those wishing more of this type of humor, we commend you to Justice Musmanno's book "That's My Opinion". In addition, Volumes 19 and 24 of the *Santa Clara Law Review* compiled vignettes from Justice Gardner's many opinions.